

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 208/2002

GAS AUTHORITY OF INDIA LTD. Petitioner

Through Mr. Ramji Srinivasan, Senior
Advocate with Mr. Navin Kumar
and Ms. Surbhi Agarwal,
Advocates

versus

THERMAX LTD & ANR.

..... Respondents
Through: Mr. A.N. Haksar, Senior
Advocate with Mr. R. Sudhinder
and Ms. Prerana Amitabh,
Advocates for R-1

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Date of Decision : April 30, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the arbitral Award dated 30th March, 2002 passed by Mr. V. Selvaraj, Sole Arbitrator.

2. Relevant facts of the case have been succinctly set out in the impugned Award. For the purposes of present petition, it would suffice

to observe that petitioner-objector and respondent-claimant had entered into a contract for installation and commissioning of Dowtherm Vapouriser at LLDPE Plant, Pata. The said plant was to be delivered within thirteen months. Since in the present case, petitioner-objector issued Fax of Intent on 9th August, 1995, the plant was to be delivered by September, 1996. However, the plant was actually completed and delivered on 31st March, 1999. Consequently, admittedly there is a delay of thirty months in completion of the contract. The learned Arbitrator in the impugned Award has, however, allowed petitioner-objector to recover only 20% of the liquidated damages. Article 26 of the General Conditions of Contract (in short “GCC”) deals with liquidated damages. The said Article reads as under :-

“ARTICLE-26 PRICE REDUCTION SCHEDULE FOR DELAYED DELIVERY

26.1 Subject to Article – 29, if the SELLER fails to deliver any or all of the GOODS or perform the services within the time period(s) specified in the CONTRACT, the OWNER shall, without prejudice to his other remedies under the CONTRACT, deduct from the CONTRACT PRICE, a sum calculated on the basis of the total CONTRACT PRICE, including subsequent modifications. Deduction shall apply as per following formula;

In case of delay in delivery of equipment/materials or delay in completion, total contract price shall be reduced by 0.5% (half per cent of the contract price per complete week of delay or part thereof subject to a maximum of 10% (ten per cent) of the total contract price. In case of delay in delivery on the part of Seller, then invoice/document value shall be reduced proportionately for the delay and payment shall be released accordingly.

In the event the invoice value is not reduced proportionately for the delay, the OWNER may deduct the amount so payable by the SELLER from any amount falling due to the SELLER or by recovery against the Performance Bond. Both SELLER AND owner agree that the above percentages of price reduction are genuine pre-estimate of the loss/damage which the OWNER would have suffered on account of delay/breach on the part of the SELLER and the said amount will be payable on demand without

there being any proof of the actual loss/or damage caused by such breach/delay. A decision of the OWNER in the matter of applicability of price reduction shall be final and binding. (Date of delivery/completion date shall be the date of Bill of Lading, date of RR/LR, date of successful commissioning and handing over the plant to OWNER).”

3. At the outset, Mr. Ramji Srinivasan, learned senior counsel for petitioner-objector submits that the factual findings of the Arbitrator that there was delay in release of advance payment, purchase order, change of supplier of burner as well as delay on account of site conditions and petitioner’s insistence for not using Dowtherm liquid as testing medium, are erroneous and contrary to record. Mr. Srinivasan lays considerable emphasis on challenging the Arbitrator’s finding with regard to change of supplier of burner from John Zink to North American. He points out that it was open to respondent-claimant to have opted for any other supplier from the list of pre-approved suppliers. Moreover, he points out that petitioner-objector’s consultant had given the respondent-claimant an option to choose another supplier in January, 1996 and not March, 1996 as erroneously found by the Arbitrator. In this connection, Mr. Srinivasan places reliance upon petitioner-consultant Novacor’s letter dated 26th March, 1996 which reads as under:-

*“Subject: BURNERS FOR GREASE BURNING DTA
VAPORIZERS*

- 1. I received a copy of a fax sent from Thermax (Mr. I.M. Baxi) to EIL (Mr. Mathur) regarding problems obtaining performance guarantees from John Zink with respect to grease burning in their gun.*
- 2. In paragraph 7 of the fax it states that “Your process licensor M/S Novacor insisted for John Zink make only”.*

I have reviewed all of the correspondence we have sent to EIL and Thermax and I don't see where we indicated that John Zink was the only acceptable supplier for this burner. In fact we suggested at the January meeting in Toronto, between Thermax and Novacor, that John Zink was being usually obstinate and that Thermax should investigate an alternate supplier.

- 3. John Zink burners (through Born Heaters) are installed in two of our SCLAIRTECH plants and they perform well. North American burners (through Struthers Wells) have been installed in three other SCLAIRTECH plants and they are functioning satisfactorily also. The BEP indicates that there are acceptable alternatives providing they are externally atomized burners.*
- 4. In my opinion, you should abandon John Zink as a supplier and obtain North American burned guns for this application (as per paragraph 3, option 2, of Mr. Baxi's fax). It appears to me that John Zink are not prepared bend from their position regarding the requirement of pumping and hearing facilities in the grease line. As Mr. Baxi's fax correctly states there cannot be pumping and hearing equipment installed in this line.*

Best Regards

Sd/--

*K.J.Morrison,
Provision Engineer,
SCLAIRTECH"*

4. According to Mr. Srinivasan, the Arbitrator has also erred in devising his own method/principle of proportionate liability, when respondent-claimant had admitted that delay of more than six months was on account of the respondent-claimant. In this connection, he relies upon respondent-claimant's own letters dated 4th December, 1996 and 6th December, 2000.

5. *Dehors* the aforesaid two letters, Mr. Srinivasan points out that mobilisation of site was commenced by respondent-claimant only on

15th May, 1996 even though the same was to commence in August, 1995 or at least after the receipt of advance in October, 1995. According to Mr. Srinivasan, Arbitrator could not have devised his own ratio of delay, namely, 80 : 20 as he did in para 3 at page 26 of the impugned Award.

6. Mr. Srinivasan also impugns the Award insofar as it awards payment of Rs. 36,31,821/- on account of additional valves and instruments. He points out that in the Minutes of Meeting held on 11th August, 1997 and the respondent-claimant's own letter dated 27th August, 1997, the respondent-claimant had agreed that it would supply the aforesaid additional material without any additional cost.

7. Mr. Srinivasan further impugns the Award to the extent it awards Rs. 5,71,000/- to respondent-claimant on account of additional work contract tax. In this connection, he relies upon petitioner-objector's letter dated 6th January, 1997 wherein it was made clear that work contract tax only to the extent of Rs. 44.60 lacs would be borne by petitioner-objector and any liability in excess of the said amount would be borne by the respondent-claimant.

8. Mr. Srinivasan lastly submits that the rate of interest awarded by Arbitrator is usurious and excessive.

9. On the other hand, Mr. A.N. Haksar, learned senior counsel for respondent-claimant submits that the impugned Award is a well reasoned one and has been passed after appreciating the entire

pleadings and documentary evidence placed on record. He refers to the findings of fact arrived at by the Arbitrator with regard to delay in execution of the contract. The relevant portion of the Award relied upon by Mr. Haksar is reproduced hereinbelow:-

1. The basic issue that I have considered is whether the Respondents were responsible for the delays attributed to them by the Claimants and if yes, whether these delays had resulted in the overall delay in execution of the contract within the stipulated time schedule.

2. The delays have been grouped into the following broad heads:

RELEASE OF ADVANCE

The Claimants had submitted that release of advance payment was an essential part of timely commencement of the execution of the contract. As against the Claimants requirement of release of advance along with the release of Fax of Intent (Annexure 5, Volume-I of Rejoinder) and reiterated in the Acceptance of Purchase Order dated 13.10.95 (Annx. 4, Vol.-1 of Rejoinder), the first advance was released by the Respondent on 30.10.95, more than 2 months after the issue of Fax of Intent on 9.8.95.

The Respondents had submitted that as per terms and conditions of the contract, the advance could be released only after the receipt of Acceptance of Purchase Order, Bank Guarantee and Proforma Invoice and accordingly the advance was released on 30.10.95 soon after the receipt of all the documents by 18.10.95.

It is obvious that without receipt of the Purchase Order, the Claimants could not have issued the acceptance of the Purchase Order, which was one of the pre-requisites for release of the advance.

I find that Respondents had issued Purchase Order on 9.10.95, 2 months after issue of Fax of Intent on 9.8.95. It is to be noted that the Purchase Requisition was issued by the Respondent only with the Purchase Order and the Purchase Requisition details the actual scope of work to be carried out by the Claimants. Respondents were therefore responsible for this delay which led to a delay of 2½ months in release of advance payment which in turn affected the commencement of execution of the contract by the Claimants.

BURNER

The Claimants had submitted that order for Burner, which were one of its kind and custom built to suit the complex and sophisticated performance parameters, was placed initially on John Zink as per pre-condition of the Respondents. However

subsequently it was found that John Zink Burners were not suitable and therefore North American Burners had to be procured. This change of Burners affected the schedule of the Claimants.

The respondents submitted that it was the Claimants who had selected John Zink Burners from the list of the vendors selected for the supply of Burners. Therefore it was the Claimants who were responsible for the default by John Zink.

I find that Respondents had specified that Burners shall be of John Zink make (Page 31, Annx. 12, Vol.-1 of Rejoinder) and therefore Claimants had no responsibility in selecting John Zink and subsequent delay arising out of change from John Zink to North American. I find that the Claimants had put in considerable efforts to ensure that John Zink Burners meet the requirements as evident from the entire position explained to EIL (Engineer In-charge of the Respondents) in letter dated 21.3.96 (Annx. 12, Vol.-1 of Rejoinder). I also find that it was Novacor, Process Consultant to the Respondents who had as per minutes of meeting held on 26.3.96 (Page 33, Ann. 12, Vol.-1 of Rejoinder) advised abandoning John Zink and obtaining North American Burners. It can therefore be concluded that the Respondents by specifying John Zink Burner without first establishing the performance/suitability of such Burners to meet their requirement, were responsible in causing delay in execution of the contract by the Claimants.

SITE CONDITIONS AND FABRICATION

The Claimants had submitted that shifting of fabrication work from the site to Baroda due to non-conducive environment at the site had a direct bearing on the schedule of completion of the contract.

The Respondents had submitted that fabricator engaged by the Claimants as well as other contractors had performed in the same environment.

I find that initially the Claimants had decided to carry the fabrication work at the site as was recorded in the minutes of the meeting dated 14.2.96 (Clause C.1, Annx. 8, Vol.-1 of Rejoinder). This was despite advice given by the Respondents in the meeting dated 28/29.8.95 to carry out minimum site fabrication work (Sl. No.1.7, Page 40, Annx.14 Vol.-1 Rejoinder). It can be concluded that Respondent's letter dated 16.7.96 (Annx.17, Vol.-1 of Rejoinder) to the Claimants in regard to miscreants having attacked and looted workers and staff of contractors had resulted in the decision to shift fabrication from the site and consequent delay in execution of the contract.

TESTING MEDIUM

The Claimants had submitted that due to the insistence of the Respondents for not using Dowtherm liquid as testing medium, activity of the system testing was delayed.

The Respondents had submitted that the Claimants had never disclosed the testing medium as DOW liquid in the drawing submitted and it was only after February 1997 that the same was disclosed. On referring the matter to the Process Licensors of the Respondents, water was recommended as testing medium.

I find that the Claimants had indicated the requirement of Dowtherm vide letter datd 20.7.96 (Annx. 26, Vol.-1 of Rejoinder). The matter was further clarified vide letter dated 12.2.97 (Annx.21, Vol.-1 of Rejoinder). The Respondents had however conveyed the decision for hydrotesting only on 8.4.97 (Annx. 23, Vol.-1, of Rejoinder) and testing was done in June '97 instead of February '97.

CHEMICAL CLEANING

The Claimants had submitted that insistence of the Respondents for chemical cleaning by the Claimants had affected the pre-commissioning which in turn delayed the overall completion of the contract.

The Respondents had submitted that chemical cleaning was to be carried out by the Claimants in terms of purchase requisition and various communication issued.

I have examined clause 3.2. Sheet no.22 mentioned by both the Claimants and the Respondents and find that as per this clause (Annx.27B, Vol.1 of Rejoinder) vendor's scope of work included necessary provisions for chemicals cleaning of heater internal piping. The clause did not stipulate specifically that it was the responsibility of the Claimants (vendor) to carry out the chemical cleaning. It limits the responsibility of the Claimants to making provision only which was done by Claimants in terms of confirmation given vide letter dated 18.12.97 (Annx.39, Vol.-1 of Rejoinder). The Claimants had also mentioned that as per its collaborators, Struthers Wells, chemical cleaning was not required and that flushing activity had already been carried out after hydrotesting (Annx.30 Vol.-1 of Rejoinder).

HANDING OVER OF CONTROL ROOM

The Claimants had submitted that there had been a delay of one year by the Respondents in handing over the control room, which had resulted in delay in control panel erection and other related work. This had affected the over all project completion.

The Respondents had submitted that the Claimants had not completed the necessary work before the Respondents could hand over the control room. Mechanical work was completed by June 1998 only although the control room was handed over in June 1997.

The issue that needs to be decided is as to when the mechanical work was completed by the Claimants. This is because, work on erection of control panel etc. became necessary only thereafter. I find that the Claimants had informed the Respondents vide letter

dated 12.2.97 (Annx. 21, Vol.-1 of Rejoinder) in regard to the system testing. System testing was possible only when the system was mechanically ready. I also find that in terms of progress report for the period 9.2.97 – 15.2.97, cumulative progress achieved was 86.7% (Annx. 19, Vol.-1 of Rejoinder) and for the period 2.3.97 – 30.3.97 it was 95.51% (Annx. 20, Vol.-1 of Rejoinder) Based on these report I come to the conclusion that although the mechanical work was complete and the Claimants needed the control room, the activities related to the Control Room completion were not completed by the respondent and thus there was a delay on the part of the Respondents in handing over the Control Room.

DEMOBILISATION AND REMOBILISATION

The Claimants had submitted that they had to demobilize the site in August 1997 due to non availability of certain inputs from the Respondents, necessary for pre-commissioning and commissioning activities of the Claimants.

The Respondents had submitted that without completing pre-commissioning activities such as insulation, painting etc. the Claimants deserted the site in August 1997. The demobilization was due to non-mobilisation of insulation and instrumentation contractor.

I find that Claimants had by August 1997 installed the Vapouriser unit, carried out by testing and had erected the control panel etc. This is based on the letter written by the Consultants to the Respondents on 11/12.11.97 (Annx. 28, Vol.-1 of Rejoinder) listing out the balance incomplete work. The Respondents had not refuted the required inputs as was listed by the Claimants. I also find that the Site Engineer of the Claimants was available at site upto 15.10.97 (Annx. 30, Vol.-1 of Rejoinder) and the Claimants remobilised in December 1997 after the request for re-mobilisation was made by EIL in November 1997. It is also a fact that there was no communication from the Respondents between August 1997 and November, 1997 in regard to availability of the required inputs or re-mobilisation.

- 3. While there was delay on the part of the Respondents in various areas as discussed above which had adversely affected commencement of execution of the contract and execution at different stages of the contract, leading to a delay in completion of the project beyond the stipulated period, I also find that there was delay attributable to the Claimants which also affected the schedule of implementation. Although net effect of these defaults cannot be exactly quantified, I accept some of the contentions of the Respondents and Claimants own admission of 6 months delay on its part (letter dated 21.8.2000 given as Annexure to Reply of the Respondents and Document No.1 of Written Submission of the Respondents). However, the records do not show any continuous period of delay of six months that can be attributed to the Claimants within the contract period. The letters accepting delay therefore can be construed to indicate a delay 6 months that*

can be attributed to the Claimants in an over all delay of 30 months. Further, delay in the project was interlinked with the discharge of mutual obligations and has to be therefore seen in the context of how much delay has been caused by each party till the date of completion of the project. The delay cannot be solely attributed to one party when there were mutual obligations and execution of work contract was dependent upon the performance of respective obligations. On the basis of perusal of the records of the case and appreciation of the various facts and circumstances I apportion the responsibility for the total delay of 30 months (Schedule Date of Completion: 8.9.96 vis-à-vis Actual Date of Completion: 30.3.99) between the Claimants and the Respondents as 6 months (20%) and 24 months (80%) respectively.

a) I hold that the Claimants are entitled to an amount equivalent to 80% of the total amount claimed on account of R.A. Bill No.12 and Final Bill i.e. 80% of the total bill amount of Rs.82,70,000 which is Rs.66,16,000.

b) I hold that the Claimants are entitled to an interest @18% p.a. on the amount of Rs.66,16,000 with effect from 30.5.99 upto the date of award.”

10. Mr. Haksar emphasises that contract in question dealt with reciprocal obligations and delay by respondent-claimant did not necessarily result in loss.

11. As far as allegation of non-consideration of ‘admission’ by Arbitrator is concerned, Mr. Haksar states that the letter dated 4th December, 1996 had not been filed by petitioner-objector along with its pleadings and/or evidence.

12. Mr. Haksar further submits that the letters dated 4th December, 1996 and 6th December, 2000 have to be read keeping in view the fact that respondent-claimant at that stage did not want to adopt a confrontantist attitude and upset the commercial relationship between the parties.

13. As far as the work contract tax is concerned, Mr. Haksar submits that the Arbitrator has only reimbursed the tax liability which the respondent-claimant had incurred and according to him, the same cannot be faulted with.

14. As far as award of Rs. 36,31,821/- on account of additional valves and instruments is concerned, Mr. Haksar drew my attention to the impugned Award wherein the Arbitrator has found that the said valves and instruments were neither part of the original technical offer nor part of the piping and instrumentation drawing. The relevant portion of the impugned Award reads as under :-

“4.....I accept the contention of the Claimants that their commercial offer was based on their technical offer, which included Piping and Instrumentation Drawing (P&ID). P & ID did not provide for such valves and instruments. The Respondents placed the order on the Claimants based on the technical and commercial offer of the Claimants, which did not offer such valves and instruments. I also find that the Respondent's Process Licensor, after examining the P&ID of the Claimants had indicated the requirements of such valves and instruments to the Respondents in a communication dated 27.2.95 (Page 19/99 of Annx. 46, Vol.-1 of Rejoinder) which was communicated to the Claimants by the Respondents only on 28/29.8.95 much after acceptance of offer of the Claimants (without such valves and instruments).....”

15. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in ***Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi*** reported in (2008) 13 SCC 80, after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*** reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference

by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy. Even though Section 34 of Act, 1996 permits a Court to interfere on the ground of an arbitral award being violative of public policy, various judgments of the Supreme Court place an extremely restricted and limited interpretation on the term 'public policy'. (Refer to *State of Rajasthan & Ors. Vs. Basant Nahata* reported in (2005) 12 SCC 77).

16. It is settled legal position, both under Arbitration Act, 1940 and to a even greater extent under Act, 1996, that arbitral tribunal's decision is generally regarded as final and courts cannot substitute its own evaluation on questions of law and facts to come to the conclusion that arbitral tribunal has acted contrary to the bargain between the parties. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Courts to take upon itself the task of being a judge on the evidence before the arbitrator (Refer to *M/s. Sudarsan Trading Co. Vs. Government of Kerala and Anr.* reported in (1989) 2 SCC 38).

17. Consequently, this Court is of the view that findings of fact given by the arbitral tribunal are not liable to be interfered with unless such findings are perverse and unconscionable. Moreover, as held in *Lesotho Highlands Development Authority Vs. Impregilo SpA and*

others reported in **2005 UK HL 43**, arbitrators do not exceed their powers simply by making a mistake. In ***Burchell Vs. Marsh*** reported in **58 U.S. 344 (1855)**, the United States Supreme Court held that if an award is within submission, and contains an honest decision of the arbitrators, then a Court would not set it aside for error, either in law or fact. According to the United States Supreme Court, a contrary course would be a substitution of the judgment of the judiciary in place of the chosen forum, namely, the arbitrators and would make the award the commencement, not the end of the litigation.

18. In fact, in the present case, the findings of fact are based on evidence and the Arbitrator has given cogent reasons for the same. For instance, the Arbitrator's finding with regard to delay in change of supplier of burner is borne out from the record. The Arbitrator has rightly concluded that respondent-claimant had done no wrong in initially opting for a burner from John Zink inasmuch as John Zink was one of the pre-approved suppliers by petitioner-objector. Insofar as the allegation that respondent-claimant had been given option to choose another supplier in January, 1996 is concerned, I am of the view that the same is not correct as in the letter dated 5th February, 1996 petitioner-objector's consultant Novacor had reiterated that "*John Zink has supplied similar burners for the Resilin plant of similar size and operating conditions and to date there has been no adverse reports about their performance. As such Novacor is satisfied that the burners proposed by John Zink will be entirely satisfactory in this service.*"

19. As far as the issue of liquidated damages is concerned, I find that the said concept is incorporated in Section 74 of Contract Act, 1872. However, the said provision comes into play when there is a breach by one party and the said breach results in a loss to the other party. In the present case, the contract comprises mutual understanding and reciprocal obligations, which are dependent upon each other. It seems to me that delays on the part of respondent-claimant were consequent upon delays on the part of petitioner-objector. For instance, the site could not be commissioned on the date stipulated because there was delay in release of advance payment and purchase order. In *Halsbury's Laws of England, Volume 9, page 357* it is stated thus :

"516. Criteria for determining whether promises independent or dependent. The question whether the promise of one party is a condition precedent to the liability of the other party or is independent depends upon the construction of the contract taken as a whole, and is to be determined by the intention of the parties as appearing from the terms of the contract and the surrounding circumstances. The test applied is whether the particular stipulation goes to the root of the matter so that a failure to perform it would render the performance of the rest of the contract by the party in default a thing different in substance from what the other party has stipulated for, or whether it merely partially affects it and may be compensated for in damages.

Certain stipulations are categorised by statute or by the common law as going or not going to the root of the contract, but such categorisations usually yield to any contrary intention of the parties who are free to allot such consequences as they wish to the non-fulfillment of a particular stipulation."

20. As far as letters dated 4th December, 1996 and 6th December, 2000 are concerned, I am of the opinion that the same have to be read contextually and keeping in view the fact that in law a party can always explain the circumstances to show that the said admission cannot be

used to draw an adverse inference. I am further of the view that if letter dated 6th December, 2000 is read along with the exhibit enclosed with the said letter, it would be apparent that it was respondent-claimant's case that delay in execution of the contract was primarily on account of breach of contract by petitioner-objector.

21. In the present case, it is the conclusion of the Arbitrator that delay was occasioned on account of contributory factors of both the parties. Thus blame cannot be placed upon one party exclusively. The Arbitrator has bifurcated percentage of delay attributable to each party. Such a conclusion cannot be said to be unreasonable for the reason that delay by one party does not unnecessarily result in corresponding delay of equivalent amount in execution of the contract.

22. The fact remains that both the parties were partially in default in performing their obligations and thus, the Arbitrator found that blame could not be exclusively placed at the door of respondent-claimant. I am also of the opinion that the entire liquidated damages could be fastened upon respondent-claimant only if one could reach the conclusion that respondent-claimant alone was responsible for the delay. In my view, Article 26 would not apply in its entirety as petitioner-objector was also guilty of delay in execution of contract. The Arbitrator's conclusion can hardly be said to be perverse or illegal so as to shock the conscience of this Court. Moreover, upon reading of entire Award with regard to liquidated damages, I am of the opinion

that the Arbitrator's view is a fair and just one. Consequently, it calls for no interference in Section 34 proceedings.

23. As far as work contract tax is concerned, I am of the view that the same is contrary to the contractual term as amended by petitioner-claimant vide its letter dated 6th January, 1997. The relevant portion of the said letter reads as under :-

“With reference to your letter No. HRD/HN/UDT dtd. 10th Dec '96, we hereby authorize following amendment to the subject purchase order :-

i) CLAUSE 2.0 i.e. TAXES & DUTIES OF THE PURCHASE ORDER :-

The following stipulations are added to this clause:-

“In case Form III B is not issued by GAIL, WCT at normal rate shall be reimbursable against documentary evidence. WCT at present normal rate of 7 & ½% shall be limited to Rs. 44.60 lacs. In case of statutory variation in WCT rate on either side, the ceiling amount of WCT of Rs. 44.60 lacs shall also vary proportionality”.

2. All other terms and conditions of the original order shall remain unaltered.”

(emphasis supplied)

24. Accordingly, since a sum of Rs. 5,71,000/- has been awarded over and above the ceiling limit of Rs. 44.60 lacs, the Award to that extent is set aside.

25. As far as payment of Rs. 36,31,821/- on account of additional valves and installments is concerned, I am in agreement with the Arbitrator's finding that the said valves and instruments were outside the scope of the contract executed between the parties. Since these are

additional items, respondent-claimant would normally be entitled to their cost on the basis of principles of *quantum meruit*. However, in view of the concession recorded in the Minutes of Meeting held on 11th August, 1997 and in the respondent-claimant's letter dated 27th August, 1997, respondent-claimant is estopped from claiming the said amount. Consequently, award of Rs. 36,31,821/- on account of additional valves and instruments is also set aside.

26. As far as award of interest is concerned, I deem it appropriate to reduce the rate of interest for all periods to 9% per annum simple interest. The Supreme Court in ***Rajendra Construction Co. Vs. Maharashtra Housing & Area Development Authority and Ors.*** reported in (2005) 6 SCC 678; ***McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.*** reported in (2007) 8 SCC 466 and ***Rajasthan State Road Transport Corporation Vs. Indag Rubber Ltd.*** reported in (2006) 7 SCC 700 has reduced the rate of interest. In fact, in ***Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.*** reported in (2007) 2 SCC 720 the Supreme Court has held as under :-

“11. here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

27. Consequently, keeping in view the aforesaid judgments and the prevalent rate of interest, I reduce the rate of interest for all the periods to 9% per annum simple interest.

28. Accordingly, present petition is disposed of with the modifications mentioned in paragraphs 24, 25 and 27 of this judgment, but with no order as to costs.

MANMOHAN,J

APRIL 30, 2010

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